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Nos. 83-2081, 83-6929, and 83-6952

# In the Supreme Court of the United States

OCTOBER TERM, 1984

LEIF R. SIGMOND, PETITIONER
*v.*
UNITED STATES OF AMERICA

MACK BARNES, PETITIONER
*v.*
UNITED STATES OF AMERICA

HERBERT G. CASE, JR., PETITIONER
*v.*
UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioners' motions for suppression of evidence obtained pursuant to state search warrants.

2. Whether petitioners were properly charged with violations of the mail fraud statute, 18 U.S.C. 1341, when certain features of their underlying conduct could have formed the basis for a prosecution under another statute (No. 83-6929).

3. Whether the district court erred in not ordering the government to provide a bill of particulars describing the content and volume of chemicals illegally treated by petitioners and whether there was sufficient evidence at trial on that subject.

4. Whether the district court erred in quashing petitioners' subpoena directed to the House of Representatives.

5. Whether the verdict should have been set aside on the ground that the jury considered petitioners' failure to testify.

6. Whether the jury's consideration of documents improperly appended to exhibits sent to the jury constituted reversible error (No. 83-6929).

7. Whether the district court erred in its instructions to the jury (No. 83-2081).

8. Whether there was a fatal variance between the allegations in the indictment regarding petitioner Sigmond and the evidence adduced at trial (No. 83-2081).

9. Whether the district court erred in sentencing petitioner Sigmond (No. 83-2081).

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OCTOBER TERM, 1984

No. 83-2081

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## OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A3)[1] is unreported. The written opinion of the district court dated November 16, 1982 (Pet. App. C1-C12) and the oral opinion of the district court rendered November 1, 1982 (Pet. App. J1-J57) are unreported.

[1]"Pet. App." refers to the appendix to the petition in No. 83-2081, unless otherwise indicated.

## JURISDICTION

The judgment of the court of appeals was entered on April 16, 1984. The petition for a writ of certiorari in No. 83-6929 was filed on June 14, 1984. The petitions for a writ of certiorari in Nos. 83-2081 and 83-6952 were filed on June 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and on various counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Barnes was sentenced to a six-month term of imprisonment, a five-year term of probation, and a $500 fine; petitioner Case was sentenced to an 18-month term of imprisonment, a five-year term of probation, and a $2,000 fine; and petitioner Sigmond was sentenced to a two-and-one-half-year term of imprisonment, a five-year term of probation, and a $10,000 fine.[2]

1. The evidence at trial showed that in 1977 and 1978 petitioners were affiliated with Scientific Chemical Processing Company (SCP), a company that operated two waste removal and processing plants in New Jersey. Petitioner Sigmond was president of the company, petitioner Case was vice-president, and petitioner Barnes was an employee. Petitioners made decisions about the types of waste products that would be handled by SCP and the disposal of such products. Tr. 2876-2879, 2903. Petitioners used two primary disposal methods: if waste material was in liquid form, they would dump it down the sewer by connecting a hose from a tanker truck to the sewer drain; if the material

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[2]Scientific Chemical Processing Company (SCP), petitioners' co-defendant, was convicted of conspiracy and mail fraud and was fined a total of $17,500. SCP did not appeal its convictions.

was in solid form, they engaged an independent contractor, Taylor Pumping Service, to dump the material at the Lone Pine Landfill in Freehold, New Jersey. *Id.* at 966, 3930. Between January and June 1978, the better part of approximately 18,000 drums of material taken from the two plants was dumped at Lone Pine (*id.* at 3930).

Most of the waste materials were by-products of industrial processes used by SCP's customers. In order to induce these customers to use SCP's services, petitioners promised them that SCP would use proper disposal methods for each customer's particular wastes. For example, petitioners assured Rohm & Haas that SCP would use a "fuel recovery program" to dispose of the acryloid wastes Rohm & Haas shipped to SCP (Tr. 1653-1655). Another customer, American Hoechst, dealt with SCP because petitioners had promised that wastes from American Hoechst's production process would be incinerated (*id.* at 3033-3034).

Petitioners also led public entities, such as the State of New Jersey and the Passaic Valley Sewer Commission (PVSC), to believe that it was using proper methods to treat and dispose of the wastes shipped to its plants. Documents SCP was required to submit to PVSC stated that SCP was simply "recovering solvents, * * * blending fuels and * * * selling them back to the companies" (Tr. 3535), and that no solvents were being treated in SCP's plants. In fact, SCP received solvents and dumped them down the sewer (*id.* at 1316, 1849, 3913).

SCP was required to inform the New Jersey Department of Environmental Protection of waste shipments, so that the Department could keep track of dumping operations. In order to avoid detection of SCP's Lone Pine operation, petitioners instituted a system under which the manifests that were to be submitted to the Department were left blank (Tr. 1070-1072). Drivers going to Lone Pine were not given

manifests (*id.* at 1767-1768). In addition, although SCP was required by state law to submit quarterly reports indicating, inter alia, the method by which each type of waste was to be handled, petitioners did not disclose to the State either that it had been engaged in dumping materials at Lone Pine or that it was using sewers to remove liquid wastes.

2. Prior to trial, the district court denied petitioners' motions for a bill of particulars, although it did require the government to provide petitioners with a list of the specific statutes and regulations petitioners were alleged to have violated (Pet. App. C4-C12, E1-E4). The district court also denied petitioners' motions for dismissal of the indictment, for suppression of certain evidence gathered by the State of New Jersey, and for severance of their trials (*id.* at C3-C4, E2-E3, J1-J57).

Petitioners did not testify at trial. However, they presented evidence intented to show, inter alia, that the materials SCP had dumped into sewers or at Lone Pine were not hazardous wastes. After petitioners were convicted, counsel for petitioner Case submitted an affidavit indicating that several jurors had approached him after the trial and had informed him that during their deliberations they had considered petitioners' failure to testify (Pet. App. R1-R4). Petitioners moved for a new trial, alleging, inter alia, that the jury had improperly considered petitioners' failure to testify, that the jury's consideration of certain business records erroneously appended to a trial exhibit deprived petitioner Barnes of a fair trial, and that the district court erred in failing to suppress evidence. The district court denied the motions.

3. The court of appeals affirmed petitioners' convictions in a judgment order (Pet. App. A1-A3). The court rejected petitioners' contentions that admission of evidence previously suppressed by a state court violated the Fourth

Amendment; that the conduct at issue was not properly prosecuted under the mail fraud statute; that the district court should have required proof of, and allowed discovery concerning, the chemical content of the materials alleged to have been illegally dumped; that petitioners were prejudiced by a variance between the indictment and the proof at trial; that the sentencing determination violated equal protection; that admission of a private diary into evidence constituted error; that the district court erred in instructing and supervising the jury and in refusing to enforce petitioners' subpoenas; and that petitioner Barnes was prejudiced by the inadvertent disclosure to the jury of documents not in evidence.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of the fact-bound questions petitioners present is not warranted.

1. Petitioners contend (83-2081 Pet. 14-30; 83-6929 Pet. 8-10; 83-6952 Pet. 7-18) that the district court should have suppressed evidence state authorities obtained pursuant to search warrants and eventually turned over to federal officials. That contention is without merit.

Petitioners contend that state law enforcement officers lacked sufficient evidence of illegal conduct to support issuance of the search warrants. But the district court examined the affidavits that accompanied the warrant application and concluded that they did establish probable cause to believe a crime was being committed;[3] the court cited, inter

[3]A New Jersey state court, after first refusing to suppress the evidence, had concluded that the warrants were not based on probable cause. The district court noted that it was "difficult to comprehend" the state court's conclusion that probable cause did not exist (Pet. App. J20-J21).

alia, the nighttime activity officers had observed at SCP, indications that SCP was piping waste material into the sewers without authorization, and the results of checks of the sewers above and below the SCP location (Pet. App. J20-J26). Its fact-bound conclusion regarding the existence of probable cause is supported by the affidavits and does not warrant further review.[4] The district court also concluded correctly (*id.* at J23-J27) that any taint from an improper state warrant would not affect the federal government, since the attorney for SCP had consented to use of the evidence by federal prosecutors and because, in any event, the federal government could have obtained the evidence through enforcement of a grand jury subpoena. See *Segura* v. *United States,* No. 82-5298 (July 5, 1984), slip op. 8-9.

2. Petitioner Barnes contends (83-6929 Pet. 10-14) that he should not have been charged with mail fraud because there is more "particularized federal legislation" that deals specifically with the problem of "illegal dumping of industrial chemical wastes" (*id.* at 11). The factual predicate for this contention is lacking. Barnes did not concede at any

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[4]Even if it were found that the application for the state warrants did not contain sufficient information to support a finding of probable cause, the officers reasonably relied on the state court's issuance of the warrants. Petitioners do not attack the "good faith" of the officers, the manner in which the officers went about seeking and executing the warrants, or the role played by the issuing judge. Suppression of the evidence therefore would have been inappropriate. See *United States* v. *Leon,* No. 82-1771 (July 5, 1984).

Petitioners' claim that the warrant application was based on stale information is clearly without merit. The affidavits show (Pet. App. K1-K5, L1-L12, M1-M2) that the activities observed by the officers continued over a period of time, up to at least 18 days before the application for the warrants. In view of the pattern of apparently illegal activity the officers had observed in connection with an ongoing business operation, it was likely that such activity was continuing at the time of the warrant application.

point in the proceedings that his conduct was prohibited by the statute he cites, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* (FWPCA); to the contrary, all the petitioners claimed that the government failed to show that the materials dumped down the sewer or at Lone Pine were "hazardous wastes" that required special treatment.

In any event, Barnes' contention is legally insubstantial. As the district court noted (Pet. App. J8-J9, J11), the essence of the offense charged in the indictment was a fraudulent scheme, not water pollution. Even if the mail fraud statute and the FWPCA addressed the same sort of conduct, Barnes' claim that the government was precluded from charging a violation of the more general statute lacks merit. This Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder,* 442 U.S. 114, 123-124 (1979). The courts of appeals have uniformly rejected claims that existence of a specific penal statute precludes application of a more general statute. See, *e.g., United States* v. *Grande,* 620 F.2d 1026, 1029-1030 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *United States* v. *Carpenter,* 611 F.2d 113, 115 & n.3 (5th Cir.), cert. denied, 447 U.S. 922 (1980); *United States* v. *Jones,* 607 F.2d 269, 271-273 (9th Cir. 1979), cert. denied, 444 U.S. 1085 (1980).

3. Petitioners contend (83-2081 Pet. 31-38; 83-6929 Pet. 14-16; 83-6952 Pet. 28-33) that they were entitled to a bill of particulars describing the chemical composition of the substances sent to SCP and dumped down the sewer or at the Lone Pine landfill. That claim is without merit.

A bill of particulars is not a discovery tool; rather, its primary purpose is to inform defendants of the charges against them so that they can prepare a defense. The decision whether to grant a request for a bill of particulars is

within the discretion of the district court. *Wong Tai* v. *United States,* 273 U.S. 77, 82 (1927). The district court clearly did not abuse that discretion in this case.

Several months before trial, pursuant to a discovery order entered by the district court, petitioners were given access to numerous documents, including exhibits the government intended to introduce at trial. See Pet. App. C5-C6. The district court expressly found that shipping records made available to petitioners under the discovery order provided them "with all that they need to prepare their defense" with respect to the chemical composition of the dumped substances (*id.* at C8). Petitioners do not suggest why the records to which the district court referred were insufficient to permit them to prepare for trial or what other evidence they could have presented if they had had more detailed information prior to trial.

Petitioners also contend that there was insufficient evidence presented at trial to establish the chemical composition of the materials handled by SCP. But the prosecution was not required to show that particular substances had been illegally dumped; instead, it was required to prove that petitioners engaged in a "scheme and artifice to defraud" in disposing of substances (*e.g.*, that they had misrepresented the manner in which they disposed of substances). In any event, there was ample testimony about the nature of the materials handled by SCP. See, *e.g.*, Tr. 1646-1647, 1653-1656, 1659, 1686-1687, 3053-3054 (acryloids shipped by Rohm & Haas); *id.* at 3097-3098 (acid drums shipped by Konistoga); *id.* at 2246, 3033-3034 (materials consisting of 50% methanol, 50% water, and some salt and organic sulfides shipped by American Hoechst); *id.* at 3462-3465, 3052 (describing composition of Kolene shipped to SCP for disposal).

4. Petitioners contend (83-2081 Pet. 54-60; 83-6929 Pet. 16-20; 83-6952 Pet. 33-38) that the district court erred in failing to enforce a subpoena duces tecum served on the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. In fact, the district court's grant of the Committee's motion to quash was entirely proper.

Although petitioners refer to the "Speech and Debate privilege" (83-2081 Pet. 56), the district court did not rely on any such privilege in declining to enforce the subpoena under Fed. R. Crim. P. 17(c). Instead, the court concluded first that petitioners had not made the requisite showing of relevancy. See Tr. 4089 (finding that "the wide-ranging material which even [petitioners'] narrow subpoena seeks is either patently irrelevant or so marginally relevant as to offer no basis for ordering production"). The court also concluded that any documents likely to be produced under the subpoena had already been turned over to petitioners prior to trial. See *ibid.* (noting that the United States Attorney's Office "has everything the Subcommittee obtained" and that petitioners had had "access to an extraordinary volume of records in this case"). Either of these grounds in itself was sufficient to support the district court's decision to quash the subpoena. See *United States* v. *Nixon*, 418 U.S. 683, 699 (1974).

Moreover, petitioners concede that they were "unaware of what specifics the documents would reveal" (*e.g.*, 83-2081 Pet. 55). Thus, they cannot show that the subpoena was anything more than a discovery device. This Court has held that a subpoena duces tecum "was not intended to provide a means of discovery for criminal cases." *United States* v. *Nixon*, 418 U.S. at 698; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220 (1951).

5. Petitioners contend (83-2081 Pet. 47-54; 83-6929 Pet. 15-16; 83-6952 Pet. 18-28) that the jurors' consideration of their respective decisions not to testify denied petitioners their Fifth Amendment rights. The courts below correctly rejected this contention.

Fed. R. Evid. 606(b) precludes examination of a juror about "the mental process by which the verdict was arrived." *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983) (per curiam), slip op. 7 n.5. See also *Mattox* v. *United States*, 146 U.S. 140, 148-149 (1892). The rule provides that a juror may not testify "to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict * * * or concerning his mental processes in connection therewith * * *." Thus, as a practical matter, a verdict may not be impeached on the ground that some jury members allegedly disregarded the instruction that they should not consider a defendant's failure to testify.

Petitioners attempt to analogize consideration by jurors of an occurrence during the course of the trial (*i.e.*, a defendant's failure to testify) to cases in which jurors have learned information from an external source, such as newspaper articles. The latter situation falls within an express exception to the prohibition of Rule 606(b). But in cases in which jurors are alleged only to have indulged in an inappropriate assumption about the proceedings before them, misconstrued a principle of law, or failed to adhere to the court's instructions regarding the proof adduced at trial, the courts of appeals are in agreement that Rule 606(b) prohibits conduct of a hearing into the jurors' deliberative process. See, *e.g.*, *United States* v. *Friedland*, 660 F.2d 919, 927-928 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982) (consideration of defendants' failure to testify); *United States* v. *Jelsma*, 630 F.2d 778, 779 (10th Cir. 1980) (alleged confusion of jurors concerning number of persons involved in

gambling scheme); *United States* v. *D'Angelo*, 598 F.2d 1002, 1003-1005 (5th Cir. 1979) (allegation that jurors either misunderstood or intentionally misapplied the law); *United States* v. *Chereton*, 309 F.2d 197 (6th Cir. 1962), cert. denied, 372 U.S. 936 (1963) (allegation that conviction was improperly based on count that had been dismissed during trial); *Walker* v. *United States*, 298 F.2d 217, 226 (9th Cir. 1962) (jurors' alleged misconceptions about instructions on entrapment).

Petitioners Sigmond and Case contend that the jury instructions highlighted petitioners' failure to testify. However, the instruction given (Tr. 5065-5066) was a standard one.[5] Moreover, as the district court correctly noted, the charge was responsive to the "vehement closing arguments of defense counsel calling upon the jury to make inferences adverse to the Government by reason of the failure to call as witnesses various persons who were not part of the panoply of witnesses produced by the Government" (May 4, 1983 Tr. 76).[6]

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[5]The trial court gave the pattern jury instruction found at 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.19 (1977):

> If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who is equally available to both parties, or where the witness's testimony would be merely cumulative.
>
> The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

[6]Petitioners allude briefly to statements made by the prosecutor in his rebuttal to the defense summations. Those statements (Pet. App. Q2-Q9) contain no reference to petitioners' failure to testify; they merely suggest that the evidence petitioners presented did not overcome evidence presented by the prosecution in certain areas. Counsel for petitioner Barnes specifically acknowledged that the prosecutor's rebuttal was proper in view of the defense summations. See 83-6952 Pet. 20.

Case suggests (83-6952 Pet. 21) that the trial court failed to distinguish "between a witness generally and petitioners." However, the court emphasized in the charge that a defendant has no duty of "calling any witnesses or producing any evidence" (*id.* at 20). Moreover, petitioners themselves specifically objected to the court's proposal that it instruct that a defendant has "no obligation to testify and the legal consequences of not testifying" (May 4, 1983 Tr. 75). Although Case suggests that petitioners were unaware that a missing witness instruction would be given, they themselves created the need for such an instruction by their own summations. As Case himself appears to acknowledge (83-6952 Pet. 20-21), petitioners had ample opportunity to voice their objections to the charge after the court instructed the jury. The record does not indicate that petitioners advised the trial court that they had changed their minds and wished the court to supplement the missing witness instruction with the instruction they previously had rejected. Thus, they cannot now complain that the instructions given were improper.[7]

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[7]Petitioners also rely on *Lakeside* v. *Oregon*, 435 U.S. 333 (1978). See, *e.g.*, 83-6952 Pet. 22. However, the Court in that case held merely that it was not error to instruct the jury, over defendant's objection, that no adverse inference should be drawn from the failure of the defendant to testify. That holding does not support Case's claim that a defendant can successfully urge the court not to give such a charge and then complain later that failure to give the charge constitutes error; it suggests merely that had the trial court here ignored counsel's objection and given the instruction, there would have been no error.

Petitioner Case also seeks to reinforce his claim by contending (83-6952 Pet. 23-24) that in the particular circumstances of this case the trial court erred in failing to inquire on voir dire about the willingness of prospective jurors to adhere to the presumption of innocence. We note that Case did not raise the voir dire issue in the court of appeals, and the court did not mention the issue in its opinion. Absent exceptional circumstances not present in this case, the Court will not review an

6. Petitioner Barnes contends (83-6929 Pet. 20-23) that the jury's consideration of several pages that referred to Mack Barnes Trucking, which were inadvertently appended to exhibits sent to the jury, constituted reversible error. That contention lacks merit.

A defendant's conviction may not be reversed absent "plain error" where, as here, the court specifically offered defense attorneys the opportunity to examine all the exhibits before they were sent to the jury room (Tr. 5153). Under such circumstances, defense counsel's failure to call attention to any exhibit not in evidence "may well constitute a waiver." *United States* v. *Strassman*, 241 F.2d 784, 786 (2d Cir. 1957). See also Fed. R. Crim. P. 51, 52(b); *United States* v. *Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975); *United States* v. *Bishop*, 492 F.2d 1361, 1365 n.5 (8th Cir.), cert. denied, 419 U.S. 833 (1974); *United States* v. *Burket*, 480 F.2d 568, 571 (2d Cir. 1973); *United States* v. *Yoppolo*, 435 F.2d 625, 627 (6th Cir. 1970).

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argument that was not raised in the court of appeals. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, Case concedes (83-6952 Pet. 23) that "the trial court is not obligated to inquire about the presumption of innocence at the voir dire stage of a criminal trial." See also, *e.g.*, *United States* v. *Price*, 577 F.2d 1356, 1366 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); *United States* v. *Ledee*, 549 F.2d 990, 992 (5th Cir.), cert. denied, 434 U.S. 902 (1977); *United States* v. *Gillette*, 383 F.2d 843, 849 (2d Cir. 1967). And see *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981) (plurality opinion) (no reversible error in trial court's failure to inquire on voir dire into the possibility of racial or ethnic prejudice against the defendant); *id.* at 194-195 (Rehnquist, J., concurring). But see *United States* v. *Hill*, 738 F.2d 152 (6th Cir. 1984), petition for rehearing pending. Any conflict *Hill* might create on the question whether trial courts must inquire on voir dire concerning the presumption of innocence has not yet matured, since the government's petition for rehearing in that case is still pending. In any event, since the issue was not properly preserved here, this would not be an appropriate case in which to consider any such conflict.

In any event, a conviction clearly should not be reversed under such circumstances unless the documents were so prejudicial that the defendant was denied a fair trial. See *United States* v. *Camporeale,* 515 F.2d at 188.[8] Here, there was no significant prejudice to Barnes. The trial court instructed the jury that Mack Barnes Trucking was not an active business during the period at issue and that it should disregard the documents (Tr. 5157-5158). The court subsequently found specifically that petitioner Barnes was not prejudiced by submission of the documents to the jury (May 4, 1983 Tr. 75).[9] That finding by the trial court is entitled to considerable weight. See *United States* v. *Bruscino,* 687 F.2d 938, 941 (7th Cir. 1982) (en banc), cert. denied, 459 U.S. 1211, 1228 (1983).

7. Petitioner Sigmond contends (83-2081 Pet. 60-64) that the trial court erred in failing to instruct the jury concerning the defense theory of the case. That contention is unfounded.

Sigmond claims that the trial court should have instructed the jury that it was required to find that he had "knowledge" of the particular facilities being used by SCP for disposal of wastes (83-2081 Pet. 60-61). In fact, it was petitioner Case's counsel who argued to the trial court that the jury should consider that "Mr. Case claims that [persons with whom SCP dealt] at no time advised SCP or him that materials

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[8]Barnes asserts (83-6929 Pet. 22) that the Third Circuit spoke in *United States* v. *Friedland, supra,* in terms of whether there is a "reasonable possibility of prejudice." *Friedland* makes clear, however, that a new trial is not warranted unless documents were "so prejudicial that the defendant was denied a fair trial." 660 F.2d at 928.

[9]The trial court cited, inter alia, the overwhelming evidence of guilt of all petitioners, including Barnes; the fact that most of the payments shown on the documents occurred prior to the period of the conspiracy; and the fact that the government did not rely on Barnes' position as the basis for urging conviction (May 4, 1983 Tr. 75).

were taken to Lone Pine Landfill or that he was engaging in any illegal conduct in the disposal of materials" (C.A. App. 476a). Even if the proposed charge had been drafted to refer to Sigmond, as well as Case, the trial court was not required to give the charge in the particular form urged by petitioners. The court instructed the jury that "merely lax, negligent or careless" conduct was insufficient to sustain a conviction and that there must be a finding of "evil motive or corrupt intent" (*id.* at 497a). That instruction was clearly sufficient to encompass Sigmond's theory of the case.

Similarly, Sigmond cannot complain because the court declined to instruct the jury that petitioners could be acquitted if they acted in accordance with the "state of the art" then in existence (see 83-2081 Pet. 61-64). Sigmond does not suggest that the trial court could be faulted for failing to give the instruction if no factual basis had been adduced at trial to support the theory. See *United States* v. *Blair,* 456 F.2d 514, 520 (3d Cir. 1972). In fact, there was no evidence at trial that the "state of the art" was to dump liquid wastes down the sewer or to use the Lone Pine landfill for disposal of solid wastes. In any event, because the charges here stemmed from petitioners' misrepresentations regarding the manner in which wastes were handled, any evidence relating to the "state of the art" could not have provided Sigmond with a legally viable defense.

8. Petitioner Sigmond contends (83-2081 Pet. 39-42) that there was a prejudicial variance between the charges in the indictment and the proof at trial. That contention, which appears to be merely a challenge to the sufficiency of the evidence that he participated in the Lone Pine aspect of the conspiracy charged in Count 1, does not warrant review by this Court. In any event, there was ample evidence of Sigmond's participation in the conspiracy, including testimony that Sigmond, as president of SCP, was told about the problems that allegedly necessitated the illegal dumping

practices at Lone Pine (Tr. 2945, 2948, 2952-2953) and that he specifically directed key employees in this aspect of SCP's operations (*id.* at 2948, 2952, 2954).

9. Petitioner Sigmond challenges the disparity between his sentence and those given petitioners Case and Barnes (83-2081 Pet. 42-46). Sigmond never filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35; nor did he otherwise present his contentions to the district court. In any event, the claim is insubstantial.

An otherwise lawful sentence may not be attacked solely because of disparity in sentencing. See, *e.g., United States* v. *De La Fuente,* 550 F.2d 309, 310 (5th Cir. 1977); *Green* v. *United States,* 334 F.2d 733, 736 (1st Cir. 1964), cert. denied, 380 U.S. 980 (1965). Moreover, Sigmond's assumptions regarding the reasons for the disparity are incorrect. Contrary to Sigmond's assertion that he was penalized simply for his status as head of the SCP corporate hierarchy, the district court found that he was "totally in command and in control [of] * * * the activities which * * * led to the conviction here" (Pet. App. F9). Sigmond also cannot take advantage of the fact that petitioner Barnes received a lesser sentence because of the district court's perception that Barnes had been disadvantaged in certain respects.[10] It is well established that a sentencing court should take a defendant's background into account in imposing a sentence. See 18 U.S.C. 3577; *Williams* v. *New York,* 337 U.S. 241, 247 (1949).

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[10]The district court stated simply that petitioner Barnes was in a "somewhat different position than the other defendants, both as to background and as to role in the company" and that he was a "black man born in the south before the time when civil rights activities had changed the face of the south" (Pet. App. F15-F16).

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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